82-836

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NO. _____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

STATE OF WASHINGTON,

Plaintiff-Appellees,

v.

ANGEL HOFF,

Defendant-Appellant.

Petition for Writ of Certiorari From
The Washington State Court of Appeals,
Division II

PETITION FOR WRIT OF CERTIORARI

JEROME L. BUZZARD
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Olympia, Washington 98502

1-206-943-7700

QUESTIONS PRESENTED

1. Where Defendant elects to represent himself at trial, but no record is made of his knowing and intelligent waiver to counsel, is Defendant deprived of his Sixth Amendment right to counsel for trial?

2. Where Defendant represents himself at trial, is he precluded on appeal from objecting to violations of his Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to a fair trial?

PARTIES

APPELLANT-DEFENDANT

Angel Hoff

APPELLEE-PLAINTIFF

State of Washington

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LOWER COURT OPINIONS

In an oral opinion on the 24th day of March, 1980, the Honorable Carol A. Fuller, Judge of the Superior Court in Thurston County, State of Washington, granted Defendants Motion for a new trial. No. 79-1-200-7.

In a published opinion dated and filed the 6th day of May, 1982, the Washington State Court of Appeals, Division II, reversed the trial courts decision ganting Defendant a new trial. No. 4899-0-II. 31 Wn. App. 809, (1982).

On the 13th of September, 1982, the Washington State Supreme Court denied Defendant's Petition for Review of the Court of Appeals decision. No. 48813-4. 97 Wn.2d 1031, (1982).

GROUNDS FOR JURISDICTION

Defendant seeks review of the Judgment decided and entered on the 6th day of May, 1982, by the Washington State Court of Appeals, Division II, in Cause Number 4899-0-II. 31 Wn. App. 809, (1982).

28 U.S.C. §1257 (3) provides that final judgments rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court where any title, right, privilege or ammunity is specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT SIX

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or ammnities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On the evening of July 26, 1979, Defendant HOFF pushed a fully clothed Craig Phelps into the swimming pool at the Aquarian Apartments in Tumwater, Washington. The next evening, Phelps, accompanied by Willie Durden, (both juveniles), returned to Defendants apartment to secure an apology. Defendant was not of a mind to apologize and an altercation ensued. Phelps hit Defendant on the head with a beer mug. Phelps and Durden then fled in their car, with Defendant in hot pursuit. The car chase eventually wound around to the Thurston County Jail, where Phelps and Durden complained to Police that Defendant had allegedly fired several shots at their car. Being an epeleptic and concerned about his head injury, Defendant proceeded to the local hospital for treatment. Defendant was arrested later that evening on charges of assault. No weapon was ever

found.

Represented by an attorney, JEROME L. BUZZARD, the Defendant was arraigned and entered a plea of not guilty on August 14, 1979. Trial was set for the week of October 8th, 1979.

On the 27th day of September, 1979, Mr. Buzzard withdrew as attorney for Defendant. There was a hearing in this regard, Defendant was present, and a record was made. After some discussion concerning Mr. Buzzard's Motion to Withdraw as counsel for Defendant, the following colloquy took place:

> THE COURT: I now have to inquire as to Mr. Hoff's ability to retain counsel. I take it you were retained?
>
> MR BUZZARD: Yes.
>
> THE COURT: Are you in a position to hire an attorney?
>
> MR HOFF: I am going to represent myself, Your Honor.
>
> THE COURT: You understand, Mr. Hoff, that you have an absolute right to an attorney. If you do not have funds with which to employ an attorney, an attorney may be employed to represent you and at no expense to yourself. Is that clear?

MR. HOFF: I have funds. That is no problem.

THE COURT: You have the right to represent yourself. You understand the matter is now set for trial the week of October 8?

MR. HOFF: Yes, I hope it will be sooner.

THE COURT: The Court wants to make it clear you understand you have an absolute right to an attorney to represent you in this matter.

MR. HOFF: Sure.

THE COURT: At the present time, since Mr. Buzzard's withdrawal, you are going to represent yourself in this matter?

MR. HOFF: Yes, sir.

THE COURT: Very well, I will allow you to withdraw as attorney, Mr. Buzzard.

MR BUZZAD: I have an order in that regard, Your Honor, which indicates I may withdraw effective immediately. I put in that the trial should be held on the blank day of blank. I did not know whether my client could want a continuance. I will give a copy of the order to my client. I think he understands it is still set for the 8th.

THE COURT: Very well. (signs)

MR. BUZZARD: I am handing my client a copy of the order which indicates the trial is set for October 8.

THE COURT: You understand, Mr. Hoff, if you have any good reason for continuance or something, it will have to be made within a certain period of time. If you do desire to hire another counsel, you

should do so immediately and notify the Prosecutor's office or have your attorney notify them of his representation of you. Is that clear?

MR. HOFF: Yes, sir. (Thereupon the Court recessed)

The above represents the complete Pre-Trial record and exchange between the Court and Defendant concerning his self-representation.

On October 8th, 1979, the Prosecutor filed a First Amended Information which, alleged that Defendant was armed with a deadly weapon in committing the Second Degree Assault. The Amended Information enhanced the penalty now facing Defendant, by requiring a mandatory five-year sentence in the event of a finding of guilt.

The Defendant was arraigned on the First Amended Information on the 10th day of October, 1979. Representing himself, Defendant was handed a certified copy of the Information, waived formal reading of it, and entered a plea of not guilty. There was no exchange

between the Court and the Defendant concerning his right or ability to represent himself, nor was there any discussion concerning the nature and possible consequences of the Amended Information. The trial began shortly after defendant was arraigned and lasted approximately three and one-half days.

The State's first witness was a Police Officer Ford. On redirect of Officer Ford, the Prosecutor introduced into evidence a statement supposedly given by Willie Durden to the Police on the evening of the incident. The statement was not signed or verified by Mr. Durden and Mr. Durden was not called as a witness at trial. After the Prosecutor read parts of the statement to Officer Ford, the record reflects the following:

> PROSECUTOR: Do you recall Mr. Durden giving you that statement?
>
> OFFICER FORD: Okay, I was not in the back room with Officer Davis for the full statement of William Durden at that time. I may have stepped out for a moment. I don't recall that portion of it.

PROSECUTOR: You do not recall hearing that before then?

OFFICER FORD: No, I don't.

PROSECUTOR: You want me to put Willie's statement in evidence? Do you have any objections?

DEFENDANT: No, fine.

On the Prosecutor's Motion, the Court admitted the Durden statement into evidence. The State's seventh witness was Police Officer Davis and through him the Prosecutor ellicited testimony concerning the efforts that had been made by the Police and Prosecutor to subpeona Willie Durden for trial. These efforts proved unsuccessful. On the fourth day of trial and before closing arguments, the Court met with Defendant and Prosecutor in chambers. Apparently, there was some concern about having admitted Durden's statement into evidence. Discussion in chambers was not made of record, but the Court subsequently took the bench and as a matter of record stated:

"For the record, the Court would like

to state that specifically Mr. Hoff has requested that the statements of both William Durden and Craig Phelps be retained as exhibits.

At the close of the first day of trial, the Court asked Defendant if he still insisted on representing himself. Defendant responded affirmatively. The Court then asked the Prosecutor to inform Defendant of the maximum possible penalty for the offense charged. After the Prosecutor did this, the Court then makes it a matter of record that an out-of-state attorney, on behalf of Defendant, had been present in the Courtroom during the first day of trial.

The out-of-state corporate attorney was a friend of Defendant's family. He merely sat in the courtroom and observed the proceedings. He did not sit at counsel's table. He was not there at Defendant's request, nor did he advise Defendant at any time during the proceedings. He was not present any time after the first day of trial.

In its entirity, the Trial Court record is replete with instances of the following: the Prosecutor asking questions calling for opinions from lay witnesses (i.e. opinion as to emotional state of the alleged victims; opinion as to what Defendant was thinking; opinion concerning Defendants reputation as a violent and dangerous person; and opinion as to the credibility of witnesses); using significant hearsay and irrelevant testimony, the Prosecutor paints the Defendant as being a racist and gun toting maniac; the Prosecutor asking leading and hypothetical questions with no factual foundation. In addition, the Prosecutor introduced into evidence statements given by Defendant on arrest. These statements were admitted without a pre-trial hearing to determine their voluntariness, as required by Washington State Criminal Rule 3.5.

In contrast, the record gleams with

Defendant's ineptitude and inabili+y in representing himself. His questions to witnesses are rambling and usually incoherent. Many of the witnesses state they do not understand what it is he is asking. He is constantly admonished by the Court for testifying instead of asking questions. The Prosecutors objections preclude him from using the same type and line of questioning the Prosecutor used in examining the witnesses. Besides the Durden statement, Craig Phelps was the only witness giving testimony that Defendant fired shots at the alleged victims. On the Prosecutor's objection, the Court prevented Defendant from impeaching the credibility of Craig Phelp's with a Juvenile record. In short, Defendant's confusion and frustration is patently obvious from the record.

On October 15th, 1979, the trial culminated with a jury verdict of guilty. Prior

to sentencing, Defendant hired his original attorney and a Motion for Arrest of Judgment or In the Alternative for a New Trial was filed. On March 24th, 1980, the Trial Court, after hearing arguments of counsel and considering Brief's and Affidavits on file, granted the Defendant's Motion for a New Trial. The Trial Court granted such Motion on the following reasons:

A. Defendant proved particularly inept in his representation of himself. The Court stated that Mr. Hoff "was peculiarly unable to represent himself and that became more apparent as the trial went on".

B. The Court was concerned about the appearance of judicial fairness. This was a result of Defendant filing an affidavit stating the Trial Judge had represented Defendant's wife in their very unpleasant, contested dissolution of marriage.

C. The fact that a jurors affidavit was filed with the Court stating that the juror was physically ill and mentally coerced into voting for Defendant's conviction.

D. That the Court was "sobered" by the seriousness of the charge and the mandatory five-year sentence.

E. That as a result of all the above, "substantial justice" had not been served and Defendant was entitled to a new trial.

On the 6th of May, 1982, the Washington State Court of Appeals reversed the trial courts decision granting a new trial. The Court of Appeals stated Defendant knowingly and intelligently waived his right to counsel and since "Defendant has the personal right to be a fool", he must bear the consequences of his own representation and cannot on appeal complain of the quality of the defense. The Court of Appeals failed to accept Defendant's argument that violation of Defendant's Sixth Amendment Right to confront witnesses and the totality of the circumstances deprived him of his Fourteenth Amendment right to a fair trial.

ARGUMENT FOR ALLOWANCE OF WRIT

I. THERE IS LACK OF DIRECTION AS TO WHAT FACTORS, CONDITIONS AND STANDARDS A TRIAL COURT MUST UTILIZE AND CONSIDER IN FINDING A VALID WAIVER OF THE SIXTH AMENDMENT TO COUNSEL. THE SUPREME COURT'S FAILURE TO PROVIDE CLEAR GUIDELINES HAS RESULTED IN CONFLICTING DECISIONS IN BOTH STATE AND FEDERAL COURTS.

The Sixth Amendment guarantees to an accussed person the right "to have the assistance of counsel for his defense." U.S. Const. Amend. VI. The Supreme Court held for the first time in Faretta v. California, 422 US 806, 95 S. Ct. 2525, 45 L.Ed2 562 (1975) that the Sixth Amendment, applicable to the States via the Fourteenth Amendment, grants Defendant a constitutional right to waive his right to assistance of counsel and to represent himself at trial.

Citing a composit of pre-Faretta cases, the Court briefly discussed the requirements

for an effective waiver of counsel, in stating:

> ...in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Johnson v. Zerbst, 304 US, at 464-465 82 L Ed 1461, 58 S Ct 1019, Cf. Von Moltke v. Gillies, 332 US 708, 723-724, 92 L Ed 309, 68 S Ct 316 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order to comptently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open". Adams v. United States ex rel. McCann, 317 US, at 279, 87 L Ed 268, 63 S Ct 236.

Faretta, supra, 422 U.S. 806, at 835 (emphasis added)

The Faretta Court found that the Trial Court record reflected (1) a clear and unequivocal request by Faretta to represent himself; (2) that Faretta was literate, competent and understanding; (3) that the trial judge warned Faretta it was a mistake not to accept assistance of counsel; and (4) and that Faretta was warned he would be required to follow all the "ground rules" of trial procedure.

Without offering any guidance as to how a trial judge is to determine such matters in future cases, the Court then held that Faretta had validly waived his Sixth Amendment right to counsel and the trial court committed reversible error in precluding Faretta from representing himself.

In Miranda v. Arizona, 384 US 436, 86 S. Ct. 1602, 16 L E2 694 (1966) the Supreme Court forcefully declared a procedural framework in determining validity of waiver in the Fifth Amendment right against self incrimination. Waiver is impossible unless the suspect is given his Miranda rights. The Miranda rights, their operation and waiver thereof, are clear, coherent and definitive. Miranda's detailed guidance for police officers and trial courts is indeed, one of its major virtues. By contrast, the Faretta Courts failure to properly develop waiver requirements for the Sixth Amendment right to counsel, has

forced State and Federal Courts to grapple repeatedly with the issue of what constitutes an effective waiver.

The Federal Courts alone have offered numerous factors the trial court must consider and numerous rights the defendant must be informed of, before "knowingly intelligent" waiver can be found. Among these are (1) the understanding of the Defendant that he has a choice of either proceeding pro se or being represented by counsel; (2) defendant must be warned against proceeding pro se and be made aware of advantages of being represented by counsel; (3) defendant must be warned of the charges against him and the sentence he is facing; (4) defendant must be informed that he will be held to the same procedures and rules of evidence as an attorney would be; (5) the defendant must be informed that he is entitled to a continuance, if needed, and timely made; (6) the Court should inquire into defendant's educational background; (7)

the Court should determine whether or not defendant has previous court experience; and (8) the Court should determine whether or not defendant is physically capable of conducting his own defense. United States ex. rel. Martinez v. Thomas, 526 F.2d 750 (2d Cir. 1975), United States ex. rel. Konigsberg v. Vincent, 526 F.2d 131 (2d Cir. 1975), Mixon v. United States, 608 F.2d, 588 (5th Cir. 1979), United States v. Mc Caskill, 585 F.2d 189 (6th Cir. 1978), United States ex. rel. Smith v. Pavich, 568 F.2d 33 (5th Cir. 1978).

The United States Courts of Appeals are in disagreement as to what the result should be when the trial court fails to inform defendant of the perils involved with self-representation (just one of the above-mentioned factors). In United States v. Bird, 621 F.2d 989 (9th Cir. 1980), the Court held that it would be reversable error for the trial court to fail to address warnings against self-

representation directly to Defendant. United States v. McFadden, 630 F.2d 963 (3rd Cir. 1980) and Mixon v. United States, supra, have held that failure to give such warnings, alone, is not cause for reversal.

Pre-Faretta Courts have uniformily required that the record, by reason of judicial inquiry or otherwise, contain evidence of a defendant's knowing and informed waiver. In Johnson v. Zerbst, supra, the Court held that the effectiveness of waiver "should be clearly determined by the trial court, and it would be fitting and appropriate for that determina- to appear upon the record". 304 US at 465, 58 S. Ct. at 1023 (emphasis added). In Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 884, 8 LE.2d 70 (1962), the Court converted the Johnson Courts' suggestion into a requirement that evidence of the defendant "knowing and intelligent" waiver be visible on the record:

> Presuming waiver from a silent record is impermissible. The record must show

> or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver.

Carnley v. Cochran, 369 U.S. at 516, 82 S. Ct. at 890.

Faretta and its progeny emphasis the fact that of central concern to the Supreme Court is awareness by the Defendant of "the dangers and disadvantages" attendant upon the course of self-representation. The only certain assurance of that awareness, is by a colloquy on the record between judge and defendant. An inquiry should be addressed, and normally confined, to that subject. Faretta cannot, and does not, contemplate the the propriety of granting a defendant's right to represent himself to be judged by what happened in the subsequent course of that representation. It is the record made in recognizing that right that is determinative.

In this case, one can only be schocked

at the dearth of a record concerning Defendant's "knowing and intelligent" waiver of his Sixth Amendment right to counsel. There is nothing of record that would indicate (1) that defendant was strongly advised against self-representation; (2) that defendant was told of the advantages of being represented by counsel; (3) that he would be given no special consideration regarding trial rules and procedures; (4) inquiry was not made into Defendant's ability to represent himself, i.e. educational background and/or past experience with the legal system; (5) defendnt was not informed of the penalty confronting him in the event of conviction until after the first day of trial; (6) inquiry was not made concerning defendant's physical ability to conduct his defense; and (7) defendant was not properly informed of his right to a continuance to prepare for trial, especially after he had been arraigned on the Amended Information on

the day of trial.

In short, the record is void of any indication that defendant validly waived his Sixth Amendment right to counsel. Even using the Faretta's bare-bones standards, the record cannot support a finding of waiver. Not only is there nothing to indicate that defendant was "literate, competent and understanding", the record supports a finding to the converse of this. In fact, that conclusion was painfully obvious to the trial judge when she stated defendant "was peculiarly unable to represent himself and that became more apparent as the trial went on". Unfortunately, the trial judge made that determination during and after trial, instead of before trial, as Faretta demands.

The Supreme Court should develope waiver requirements for the Sixth Amendment right to counsel analogous to those for the Fifth Amendment. The trial courts, which serve as the initial guardian for the rights of the

accused, are not informed of situations in which waiver should be presumed valid, and thus must resort to a complicated and time-consuming analysis of conflicting requirements. The advantage of a unified system of waiver requirements are obvious. The trial courts will be given a standard consistently applicable to all situations involving Sixth Amendment waiver to counsel at trial. If those standards are met, a case-by-case analysis, resulting in inconsistent and conflicting decisions on appeals, would be eliminated.

II A DEFENDANT'S ELECTION TO REPRESENT HIMSELF AT TRIAL, DOES NOT DEPRIVE HIM OF HIS FIFTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM, OR HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND A FAIR TRIAL.

The Sixth Amendment to the U.S. Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right...to be

confronted with the witnesses against him;..."

In Pointer v. Texas, 380 US 400 13 L.Ed 2d 923, 85 S.Ct. 1065 (1965), the Court stated:

> There are few subjects, perhaps, upon which this Court and other Courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental right for the kind of fair trial which is this countries constitutional goals. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him, it is a denial of the Fourteenth Amendments gaurantee of due process of law. Pointer v. Texas, 380 U.S. at 405.

The Supreme Court of the United States has spoken loudly and clearly on the right of a defendant to confront and cross-examine witnesses against him, a right which was denied defendant Hoff through the introduction of Willie Durden's unsigned, unwitnessed and improperly identified out-of-court statement.

By introducing the Durden statement, the Prosecutor, an officer of the court, demon-

strated his disregard and contempt for such a fundamental right. The Prosecutor should not have even considered using the statement. His efforts to later justify it with testimony concerning the attempts to subpeona Willie Durden for trial, only demonstrates his concern for what the record will reveal in the event of review. That the Court was also concerned about the statement is evident by the in-chambers conference held between Defendant, Prosecutor and the trial judge. After the conference, the trial judge came back on the bench and stated for the record that Defendant wanted the Durden's statement to remain of record. There is nothing of record that would indicate a knowing and intelligent waiver by Defendant of his constitutional right to confront the witnesses against him.

During trial, Craig Phelps was the only witness that testified that defendant fired

shots on the evening of the incident. When defendant attempted to impeach him by inquiring into Phelps juvenile record, the Court, on the Prosecutor's objection, precluded defendant from doing so because Phelps was a juvenile. Confronted with this issue, the Supreme Court in Davis vs. Alaska, 415 U.S. 308, 39 L.Ed 2d 347, 94 S. Ct. 1105 (1974) stated:

> The state's policy interest in protecting the confidentiality of a juvenile offenders record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. Davis v. Alaska, 415 U.S. at 320.

Willie Durden's statement and Craig Phelp's testimony were the "crucial links" in the states proof of defendants alleged act. The introduction of the Durden statement and preclusion of defendant from effectively cross-examining Craig Phelps, deprived defendant of "one of the fundamental gaurantees of life and liberty,...a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and

judicial action by provisions in the constitution of the United States..." Kirby v. United States, 174 U.S. 47, at 55, 43 L.Ed. 890, 893, 19 S. Ct. 574.

The violation of Defendant's Sixth Amendment right to confront witnesses alone constitutes a basis for confirming the Trial Court's decision in granting defendant a new trial. This, however, is only the most egregious of many violations of defendant's right to a fair trial.

Once defendant elects to represents himself, some courts have held he is precluded from raising any further questions, such as the quality of his representation or the failure of the Judge to intervene. Faretta, supra, itself, gives a rather quick reply:

> "Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "defective assistance of counsel." Faretta, supra, 422 U.S. at 835.

Faretta does not, and cannot, completely override the socially based notion of minimal justice contained in the due process clause. A defendant's due process right to a fair trial is no less important than his constitutional right to represent himself.

The Due Process Clause of the Fourteenth Amendment has long been recognized as assuring "fundamental fairness" in state criminal proceedings. See, Lisenba v. California, 314 U.S. 219, 86 L.Ed. 166, 62 S.Ct. 280 (1941). The Supreme Court generally considers the question of fairness on a case-by-case basis. As the court observed in Snider v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330 (1934):

> "Due process of law requires that the proceedings shall be fair but fairness is a relative, not an absolute concept...What is fair in one set of circumstances may be an act of tyranny in others."

The Supreme Court has strongly condemned the idea that a trial is a "sporting event"

with a "poker game" approach where gamemanship is at a premium. Williams v. Florida, 399 U.S. 78, 82, 26 L.Ed. 2d 446, 90 S.Ct. 893 (1969). The Prosecutor is not an ordinary litigant, and the trial judge does not simply insure that techinical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of the term, is achieved in every criminal trial. Brady v.Maryland, 373 U.S. 83, 87, 10 L.Ed2d 215, 83 S.Ct. 1194 (1963); Berger vs. United States, 295 U.S. 78, 88, 79 L.Ed 1314, 55 S.Ct. 629 (1935). That goal is not served, and the integrity of the judicial system is undermined, when an easy conviction is obtained due to the defendants ill-advised decision to waive counsel. The damage cannot be mitigated by the lame exclamation that the defendant simply availed himself of the "freedom to go to jail under his own banner". United States, ex rel.,v. Maldonado, vs. Deno, 348 F.2d 12, (CA2 1965).

If the established principal is that the interest of the state in a criminal prosecution "is not that it shall win a case, but that justice shall be done", Berger vs. United States, supra, then it cannot be argued that justice was served where, as here, (1) defendant was convicted in violation of his Sixth Amendment right to confront witnesses; (2) statements of defendant on arrest were used at trial without a pre-trial hearing to determine their voluntariness, as required by state law; (3) significant, irrelevant hearsay and opinion testimony was elicited by the Prosecutor to portray defendant as a racist and gun-toting maniac; (4) question of jury misconduct exist; (5) the trial judge herself admits there is a ligitimate issue involving the appearance of judicial fairness; and (6) the trial court fails to make a pre-trial determination of whether or not defendant "knowingly and intelligently" waived his Sixth Amendment

right to counsel.

The Fourteenths Amendment gaurantee of due process and a fair trial, embodies the policy that the state should win a conviction because it has obtained persuasive evidence during pre-trial investigation and not because an uncounselled defendant makes procedural and technical mistakes. Faretta, supra, does not require the trial court to protect defendant from tactical errors, however, at some point a series of them may so diminish the liklihood of a fair trial that the trial court has an obligation to intervene. There must be a balance of minimal due process with defendant's Sixth Amendment right to represent himself. The trial judge should be considered the fulcrum in maintaining that balance. If, as Faretta, supra, states, defendant should not be entitled to any special privileges concerning rules and procedure, should not the trial judge supervise the trial in such a fashion

to insure the Prosecutor complies with the same rules? The trial court can justify intervention on behalf of defendant on the due process notion that some minimal eveness in operation of the adversary system is necessary. If it is apparent to the trial court that defendant is likely to try some or all of his case in such a farcical manner that reversal would be required, effective steps must be taken to protect the defendant.

If it can be argued that the trial judge has no special duty to protect Defendant from gross violations of his constitutional rights and accepted rules of procedure; that all rules of procedure were technically complied with, and; that Defendant's failure to timely object waives his right for review; then praise is sung to the form of justice and not its substance. Inasmuch as the administration of justice is the judge's ultimate responsibility, he or she cannot be indifferent to events which diminish the quality of justice in the

courtroom.

Defendant submits that the circumstances and questions present in this case are of such constitutional significance that the Supreme Court should grant this Petition and (1) provide uniform guidelines for state and federal courts to utilize in determining a Defendant's waiver of his Sixth Amendment right to counsel; and (2) where Defendant represents himself at trial, the court should clarify the responsibilities of a trial court for insuring Defendant's Sixth Amendment right to confront witnesses against him and his Fourteenth Amendment right to a fair trial, are not violated.

RESPECTFULLY SUBMITTED:

BUZZARD, GLENN, HENDERSON & MORRIS, P.S.

By: _____
JEROME L. BUZZARD, Of
Attorneys for Appellant

"APPENDIX"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON	]	
	]	
Plaintiff,	]	
	]	
vs.	]	NO. 79-1-200-7
	]	March 24, 1980
ANGEL HOFF,	]	
	]	
Defendant.	]	
	]	

ORAL OPINION GRANTING NEW TRIAL

THE COURT: Well, the Court has been bothered by this case from its very beginning, as has everyone else. Mr. Tabor was frustrated with the case, the Court was, Mr. Hoff was. It was a very difficult set of circumstances, and the Court is going to grant a new trial based upon Criminal Rule 7.6, Subsection 8, that substantial justice has not been done.

The Court relies on the Swenson Case (62 Wn. (2d) 259). This present case is not one where there was any prosecutorial misconduct, any kind of vindictive environment, any attempt to railroad Mr. Hoff at all. In

fact, it was an effort on the part of everybody to deal with an unrepresented defendant, where it is not impossible to know answers to questions, it is not possible to know about questions the defendant will ask and the answers to them. It comes to be an almost uncontrollable process.

The Court is relying on the fact that Mr. Hoff proved particularly inept in his representation of himself and the Court has to say that straight away. It is, I believe, not incumbent on the Court to make every objection for the defendant.

It is clearly established that Mr. Hoff did waive his right to counsel and was representing himself knowingly and voluntarily, and his responsibility to conduct the trial as an advocate would conduct a trial is substantial. However, Mr. Hoff was pecularly unable to represent himself and that became more apparent as the trial went on. The fact that he insisted upon the retention of Willie

Durden's statement, as well as Mr. Nation's statement, are good examples of his inability to represent himself well. And the Court does have to refer to the word "well" and underline it, simply because there is no doubt that Mr. Hoff was competent to waive his counsel, but there is some area in which, on the other hand, he was not really up to the job of representing himself adequately.

Also relying on the Swenson Case, the Court refers to the affidavit of the juror. The affidavit of the juror is not definitive in any way, but it can be considered as one element along with the others. If there was simply the affidavit of Mrs. Ulery, the juror, submited to the Court, the Court would not grant a new trial. These are simply the matters that often come up with the jurors when they have a chance to feel uneasy after a verdict. They are not normally grounds for granting a new trial.

However, I do feel that this Court must take the affidavit into consideration along with many other things, and the Court will go on to explain some of the other things.

The Court is particularly hesitant and cautious in approaching the issue of appearance of fairness. Mr. Hoff's affidavit, which raises the issue of appearance of fairness, which is supported by his counsel's brief, points to an issue that was not raised during trial, of which the Court had no idea during the conduct of the trial, but none the less, again considering this element with all the others, the Court feels that it does have some weight and that in the eyes of the defendant, even though he did not raise the issue, it must have seemed particularly unfair to him that a judge, who had previously represented his wife in a very unpleasant dissolution case, should come to be his judge in this very, very serious criminal case. And, therefore, the Court must give some weight

to this issue of the appearance of fairness.

Further, the Court takes into consideration the fact that there is now an attorney who can represent Mr. Hoff in the way he should be represented in our classic adversary system. And even considering the expense, the time, and effort, and energy involved, it seems that the system is best served and the interests of this defendant are best served, and even the public in the broadest sense is best served by conducting this trial again in the way that it is anticipated that such trials will be conducted. That is with an attorney.

The Court is satisfied at this point that there will not be a new trial in this matter without an attorney, that in fact an attorney is available who will be able to carry the matter through to its conclusion.

Further, the Court is really sobered by the mandatory five year sentence in this matter. What would appear perhaps not to

support a new trial because of the seriousness of the punishment.

It would be so easy to settle all of this on appeal, but this Court feels that having seen the trial first hand, having dealt with the defendant face to face, that the responsibility for this case must rest with the trial court. And so the trial court, even though reluctant to grant a new trial, feels that in this particular instance it is necessary.

As a short addendum, the Court will simply address the affidavits of Mrs. Ulery and Angel Hoff and say that the Court finds that they come within the order of the Court, which extended the time for the presentation of affidavits until the 25th of February, 1980.

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IN THE COURT OF APPEAL OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Appellant, v. ANGEL HOFF, Respondent.	]]]]]]]]]	NO. 4899-0-II Division Two Filed: May 6, 1982

WORSWICK, J.--How far may a trial court go in rescuing a defendant from an inept pro se defense? Not as far as the court went in this case. On the State's appeal, we reverse an order granting a new trial.

On July 26, 1979, defendant pushed a fully clothed Craig Phelps into the swimming pool at the Aquarian Apartments in Tumwater. The next evening, Phelps, accompanied by Willie Durden, returned to defendant's apartment to secur an apology. An altercation ensued; Phelps hit defendant on the head with a beer mug and Phelps and durden fled in their car with defendant in hot pursuit. Defendant chased them through two stoplights,

sometimes at high speeds, and allegedly fired several shots at their car. Phelps and Durden sought refuge in the Thurston County jail. Defendant was arrested later that day. No weapon was ever found.

On August 2, defendant was charged with second degree assault. He was represented by counsel at his preliminary appearance and arraignment, but on September 27, the court allowed defense counsel to withdraw after defendant stated that he wanted to represent himself. Defendant indicated that he had funds to hire a lawyer and that he understood he had a right to a lawyer[1]. An amended information adding the firearm allegation, RCW 9.41.025, was filed on October 8. The trial started on October 10 and on October 15, a jury found defendant guilty of second

[1] Defendant made no contention in the trial court or here that the trial judge erred in allowing defendant to represent himself. The order granting a new trial expressly found that defendant was competent to waive counsel and did so knowingly and voluntarily.

degree assault while armed with a firearm.

After the verdict, an attorney other than original defense counsel appeared and filed post-trial motions on defendant's behalf. Several continuances followed, apparently to allow counsel time to procure affidavits in support of the motions. Finally, on March 24, 1980, the motions were heard, with defendant once again being represented by his original pretrial defense attorney. A new trial was granted. The order was extensive and detailed but essentially it concluded that substantial justice had not been done because the defense was inept, the juror claimed to have been pressured into a verdict and there was an appearance of fairness problem because the trial judge had represented defendant's wife several years earlier. The order specifically stated that no prosecutorial misconduct occurred.

As to the inept defense issue, the State apparently contends that defendant's decision

to represent himself precludes any consideration on appeal of his ineffectiveness at trial. On the other hand, defendant apparently contends that a pro se defendant should somehow be treated differently than one represented by counsel. He offers no proposed standards.

In order properly to focus on this issue, it is necessary first to consider the principles out of which the right of pro se defense arises. A defendant's right to represent himself is guaranteed by the sixth amendment to the United States Constitution and Article 1, Section 22, amendment 10 of our State Constitution Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975); State v. Jessup, 21 Wn App. 304, 641 P.2d 1185 (1982). But unlike the right to the assistance of counsel, the right to dispense with such assistance and to represent oneself is guaranteed not because it is essential to a fair trial but because the defendant

has the personal right to be a fool. See State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978), quoting People v. Salazar, 74 Cal. App. 3d 875, 888, 141 Cal. Rptr. 753 (1977). A pro se defendant must bear the consequences of his or her own representation and cannot on appeal complain of the quality of the defense. State v. Fritz, 21 Wn. App. at 360.[2]

The rules of procedure aply equally to a defendant represented by counsel or appearing pro se. Bonney Lake v. Delany, 22 Wn. App. 193, 196, 588 P.2d 1203 (1978). Counsel cannot,

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[2]We note here that the trial court remarked, in ruling on the motions, that on retrial defendant would be represented by counsel. This is an unfound assumption. Defendant's right to a pro se defense cannot be abridged by the court. State v. Jessup, 31 Wn.App. 304, 641 P.2d 1185 (1982). We also note that a new trial should be granted only if the claimed error was prejudicial (State v. Forbes, 74 Wn 2d 420, 423, 445 P.2d 204 (1968)), i.e. an error which, if eliminated, would change the result. State v. Smith, 72 Wn.2d 479, 484, 434, P.2d 5 (1967). Because defendant has the absolute right to represent himself again, we see no basis for assuming that he would not make the same or similar mistakes.

claim errors, and later, if the verdict is adverse, urge his trial objections for the first time in his motion for new trial or appeal; (Sherman v. Mobbs, 55 Wn.2d 202, 207, 347 P.2d 189 (1959)); neither may a pro se defendant. In short, a pro se defendant is simply not entitled to special consideration.

Although the trial court ruled there had been no prosecutorial misconduct, defendant appears to argue there was, preferring to describe it as "over-reaching." He cites 26 examples, the most serious of which involved the admission into evidence of a hearsay statement by Willie Durden. The record plainly shows that it was defendant who insisted that the statement come in because he thought it supported his theory of the case; further, that he persisted even after the trial judge had a conference with him in chambers and offered him the opportunity to have it withdrawn. The prosecutor had little part in this. The other examples were essentially trivial events of

the sort to be expected in a vigorously contested adversary proceeding. Defendant appears to suggest that a prosecutor, as an officer of the court, is obligated to alter his trial tactics when his adversary is a pro se defendant. We reject the notion that the prosecutor and trial court must abide by some special rules in these circumstances. One who knowingly, intelligently and voluntarily opts to represent himself is not entitled to three lawyers: The prosecutor, the court and himself. United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977); Burstein v. United States, 178 F.2d 665, 670 (9th Cir. 1949). On the other hand, if there is presecutorial misconduct, a pro se defendant is entitled to the same relief he would be if represented by counsel. See State v. Charlton, 90 Wn2d 657, 585 P.2d 142 (1978); State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976).

Defendant claims an accumulation of errors in this case similar to those in

State v. Swenson, 62 Wn2d 259, 382 P.2d 614 (1963); thus, he claims, a new trial is justified. We disagree. In Swenson, the Supreme Court reversed the trial court's denial of a motion for mistrial, primarily on the basis of defendant's inability to cross-examine the only witness implicating her in a murder plot. Repeated emotion and physical collapses by the witness precluded effective cross-examination. The errors warranting a mistrial were beyond the control of either the court or defense counsel. Here, if anyone can be blamed for the admission of evidence damaging to defendant, it is the defendant himself. His failure to object appropriately and his lack of knowledge of evidentiary rules are products of his decision to represent himself.

We can conceive of cases where an appellate court, on reviewing a whole record, could be so shocked by the proceedings as to conclude that the trial was a mockery and that

a self-represented defendant should therefore be granted a new trial. This is not such a case.

The second reason for the order granting a new trial was a juror's affidavit stating that the juror was sick with a clod during deliberation and that other jurors exerted pressure on her to vote to convict the defendant. The effect of a juror's illness and the claimed pressure by others inheres in the verdict and may not be used to impeach the verdict. State v. Forsyth, 13 Wn. App. 133, 138, 533 P.2d 847 (1975). In a motion to set aside a verdict and grant a new trial, the verdict cannot be affected either favorably or unfavorably by the fact that one or more jurors assented because of weariness, illness or importunities. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). Public policy forbids inquiries into the privacy of the jury's deliberations. State v. Gay, 82 Wash. 423 439, 144 P. 711 (1914). The court should not have con-

sidered this affidavit.

The third reason for the order was a claimed appearance of fairness question that was brought brought to the attention of the court for the first time more than three months after the verdict. On January 19, 1980, defendant submitted an affidavit advising the court that three years earlier the judge had represented defendant's wife in a dissolution proceeding. We specifically addressed the failure of a criminal defendant to raise an appearance of fairness argument until after trial in State v. Bolton, 23 Wn. App. 708, 598, P2d 734 (1979), in which we stated:

> Obviously defendant was willing to take his chances, hope for a favorable decision and resort to the appearance of fairness argument only if he was unsuccessful. Clearly, in these circumstances defendant has waived any right to object to the qualifications of the judge or the fairness of the sentencing proceedings--whether actual or apparent--and cannot now raise such issue.

23 Wn. App. at 714-15. See also In re Carpenter, 21 Wn. App. 814, 820, 587, P.2d 588 (1978). Defendant relies on Diimmel v. Campbell, 68

Wn2d 697, 414 P.2d 1022 (1966), in which the Supreme Court affirmed an order granting a new trial. In Diimmel, the trial judge's former law partner had written a letter expressing an opinion that coresponded to the judge's ruling in the case. The judge was made aware of the existence of the letter before the trial and of its contents after his ruling. The case is distinguishable. It involved a trial by jury where the judge did not decide th merits of the case and was largely without discretion in sentencing because of a mandatory minimum sentence is involved. The judge in Diimmel knew of the existence of the letter, but not its contents, before he made his ruling. In this case, the court was unaware of the prior representation until well after the trial. Defendant waived his right to make an appearance of fairness objection.

Finally, we recognize that a trial court's order granting a new trial should be reversed only for manifest abuse of discretion.

Diimmel v. Campbell, supra. Such abuse occurs as a matter of law when there is no adequate legal basis for the order. Mulka v. Keyes, 41 Wn.2d 427, 441, 249 P.2d 972 (1952). Our review suggests to us that the trial judge was principally motivated by compassion in granting a new trial. Commendable as this most certainly was, it did not suffice as a substitute for proper judicial discretion.

Reversed.

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